AGENDA DOCUMENT NO. 16-32-A

2016 AUG -9 PM 1:01

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA ITEM

OFFICE OF COMMISSIONER ANN M. RAVEL

For Meeting of 8-16-16

To: The Commission

From: Ann M. Ravel, Commissioner

Date: August 9, 2016

RE: Proposal to Rescind Advisory Opinion 2006-15 (TransCanada)

For the reasons discussed in the attached memorandum, I move to formally rescind Advisory Opinion 2006-15 (TransCanada) and the parts of other advisory opinions that purported to permit Domestic subsidiaries of foreign corporations to make contributions or donations, either directly or through separate segregated funds, in connection with federal, state, and local elections.

FEDERAL ELECTION COMMISSION
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OFFICE OF COMMISSIONER ANN M. RAVEL

MEMORANDUM

To: The Commission

From: Ann M. Ravel, Commissioner

Date: August 9, 2016

RE: Proposal to Rescind Advisory Opinion 2006-15 (TransCanada)

Ten years ago, the Commission determined in Advisory Opinion 2006-15 (TransCanada) that two Domestic subsidiaries of a foreign national corporation could make "corporate donations and disbursements" in state and local elections in the United States. *Id.* at 2-3 (citing *Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928, at 69943 (Nov. 19, 2002)). The Commission relied upon this determination in approving additional advisory opinion requests, including approving a request for a Domestic subsidiary of a foreign national corporation to establish and administer a separate segregated fund ("SSF"). *See, e.g.*, Advisory Opinion 2009-14 (Mercedes-Benz USA/Sterling).

Since the Commission reached these conclusions, however, campaign finance law has undergone fundamental change. The *Citizens United* decision and its progeny in the lower federal courts have transformed the American campaign finance system by opening up new avenues for outside and corporate spending in our elections. In my view, these changes have significantly undermined the factual and legal assumptions underlying Advisory Opinion 2006-15 (TransCanada); thus, the opinion no longer reflects good law.

Consequently, we need to clarify the status of this advisory opinion and other advisory opinions that similarly purported to permit Domestic subsidiaries of foreign corporations to make contributions or donations, either directly or through separate segregated funds, in connection with federal, state, and local elections to provide guidance to the regulated community.

The Act prohibits campaign spending "directly or indirectly" by foreign nationals. *See* 52 U.S.C. § 30121(a)(1); *Bluman v. Fed. Election Comm'n*, 132 S.Ct. 1087 (2012) (mem.), *aff'g* 800 F. Supp. 2d 281 (D.D.C. 2011). This includes a prohibition on making any expenditures, contributions, or disbursements in connection with elections in the United States. The Commission's regulations also prohibit foreign nationals from directly or indirectly participating

in decisions involving election-related activities, or in the decision-making process of any political committee. 11 C.F.R. §110.20.

Reaching the conclusion that the two Domestic subsidiaries of foreign corporations were permitted to make "corporate donations and disbursements," and similarly that Domestic subsidiaries may establish and administer SSFs, the Commission assumed that "(1) the donations and disbursements derive entirely from funds generated by the [s]ubsidiaries' U.S. operations; and (2) all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts." Advisory Opinion 2006-15 (TransCanada) at 2; *see also* Advisory Opinion 2009-14 (Mercedes-Benz USA/Sterling) at 3-4.

The Commission also opined that Congress' expansion and strengthening of the foreign nationals ban in the Bipartisan Campaign Reform Act of 2002 ("BCRA") "should not be interpreted to prohibit U.S. subsidiaries of foreign corporations from making donations in connection with State and local elections, or from making contributions in connections with Federal elections from a separate segregated fund, or both." Advisory Opinion 2006-15 (TransCanada) at 3 (citing *Contribution Limitations and Prohibitions, Final Rules*, 67 Fed. Reg. 69928, at 69943 (Nov. 19, 2002)). The Commission noted that when BCRA added the phrase "indirectly" to "[i]t shall be unlawful for a foreign national, directly *or indirectly*, to make" a contribution, expenditure, or disbursement in elections in the United States, 52 U.S.C. § 30121(1)(A)-(C), Domestic subsidiaries of foreign corporations were not prohibited from participating in state and local elections. Advisory Opinion 2006-15 (TransCanada) at 3; *see also* Advisory Opinion 2009-14 (Mercedes-Benz USA/Sterling) at 3 (finding that Congress "did not prohibit 'the participation of such subsidiaries in elections in the United States . . . through separate segregated funds'").

The *Citizens United* decision and its progeny in the lower federal courts have transformed the American campaign finance system. As Justice Stevens noted, "Unlike voters in U.S. elections, corporations may be foreign controlled," and the majority's decision in *Citizens United* "would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 424, 465 (2010) (Stevens, J., dissenting). Therefore, our campaign finance system is vulnerable to influence from foreign nationals and foreign corporations through Domestic subsidiaries and affiliates in ways unimaginable a decade ago.

This is not a hypothetical concern. On August 3, 2016, *The Intercept* reported that a Domestic subsidiary of a foreign corporation wholly-owned by a Chinese couple, which included the couple on the board of directors of the Domestic subsidiary, and which required the board's sign-off before making political contributions, made a contribution of over $1 million to a Super PAC supporting a Republican presidential candidate. *See* Jon Schwartz & Lee Fang, *The* Citizens United *Playbook: How a Top GOP Lawyer Guided a Chinese-Owned Company into U.S. Presidential Politics*, THE INTERCEPT (Aug. 3, 2016, 1:10 PM), https://theintercept.com/2016/08/03/gop-lawyer-chinese-owned-company-us-presidential-politics/.

Foreign nationals have also allegedly used sham Domestic corporations to funnel foreign money into our elections. *See* Compl. at 1-3, *United States v. Singh et. al.*, No. 14-NJ-0201 (S.D. Cal. Jan. 21, 2014), *available at* https://www.documentcloud.org/documents/1008176-complaint.html; *United States v. Matsura*, 129 F. Supp. 3d 975, 977 (S.D. Cal. 2015) (Noting that the superseding indictment alleged that a foreign national "illegally and surreptitiously funneled his money into various political campaigns and committees, including those of three San Diego mayoral candidates and a committee supporting federal candidates," totaling "approximately $600,000 in such illegal donations and lists multiple occasions in which [the foreign national] was not identified as the true source of campaign donations or the donation was concealed.").

Given the significant developments in law and practice concerning the ability of foreign national corporations to exert — at minimum — "indirect[]" authority over the contributions and expenditures of their Domestic subsidiaries, there is sufficient doubt that the "assumptions" that were "material to [the] conclusion[s]" presented in Advisory Opinion 2006-15 (TransCanada) remain valid. Advisory Opinion 2006-15 (TransCanada) at 6.

Accordingly, to clarify the current state of the law regarding the Act's prohibition of spending by foreign nationals, I recommend the Commission formally rescind Advisory Opinion 2006-15 (TransCanada) and the parts of other advisory opinions that purported to permit Domestic subsidiaries of foreign corporations to make contributions or donations, either directly or through separate segregated funds, in connection with federal, state, and local elections.